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Forty-ninth session
Geneva, 12 May-18 July 1997

DIPLOMATIC PROTECTION

Report of the Working Group

1. Pursuant to paragraph 13 of General Assembly resolution 51/160, the International Law Commission at its 2477th meeting on 15 May established a Working Group 1/ to examine further the topic of "Diplomatic Protection" and "to indicate the scope and the content of the [topic] in the light of the comments and observations made during the debate in the Sixth Committee on the report of the Commission and any written comments that Governments may wish to submit".

2. The Working Group held three meetings from 16 May to 1 July. It had before it the "General Outline" prepared by the Commission at its forty-eighth session, 2/ the topical summary of the discussion held in the Sixth Committee at its fifty-first session, 3/ and written comments submitted by Governments. 4/

1/ Mr. M. Bennouna (Chairman), Mr. I. Brownlie, Mr. J. Crawford, Mr. R. Goco, Mr. G. Hafner, Mr. M. Herdocia Sacasa, Mr. J. Kateka, Mr. Lukashuk, Mr. T. Melescanu, Mr. G. Pambou-Tchivounda, Mr. B. Sepulveda, Mr. R. Rosenstock, Mr. B. Simma and Mr. Z. Galicki (ex-officio).

2/ See Official Records of the General Assembly, Fifty-first Session, Supplement No. 10, (A/51/10), Addendum 1, p. 335.

3/ A/CN.4/479, section E (6).

4/ A/51/358 and Add.1.

3. The Working Group is mindful of the customary origins of diplomatic protection whose exercise was characterized by the Permanent Court of International Justice as an "elementary principle of international law" (The Mavrommatis Palestine Concessions). Given the increased exchange of persons and commerce across State lines, claims by States on behalf of their nationals will remain an area of significant interest. The Working Group concluded that the subject of Diplomatic Protection is appropriate for consideration by the Commission.

4. The Working Group attempted to: (a) clarify the scope of the topic to the extent possible; and (b) identify issues which should be studied in the context of the topic. The Working Group has not taken a position on various issues raised which require careful study of State practice, jurisprudence and doctrine.

5. The Working Group agreed that the study could follow the traditional pattern of articles and commentaries, but left for future decision the question of its final form. The outcome of the work of the Commission on the subject may, for example, take the form of a convention or guidelines.

6. In the view of the Working Group, the topic is primarily concerned with the basis, conditions, modalities and consequences of diplomatic protection: claims brought by States on behalf of their nationals against another State. A similar mechanism has been extended by analogy to claims by international organizations for the protection of their agents.

7. The Working Group reviewed the "General Outline" of the topic of diplomatic protection contained in the report of the Commission on the work of its forty-eighth session and decided to retain only material dealing with diplomatic protection stricto sensu. The scope of the topic will not include deriving from direct injury caused by one State to another. In other words it would only address indirect harm (harm caused to natural or legal persons whose case is taken up by a State) and not direct harm (harm caused directly to the State or its property). It concluded therefore that section 3 of the outline (Protection of certain forms of State property, and individuals only incidentally) was not strictly part of the topic.

8. The Working Group also drew attention to the distinction between diplomatic protection properly so called, that is to say a formal claim made by a State in respect of an injury to one of its nationals which has not been redressed through local remedies, and certain diplomatic and consular activities for the assistance and protection of nationals as envisaged by articles 3 and 5 respectively of the Vienna Convention on Diplomatic Relations of 1961 and the Vienna Convention on Consular Relations of 1963.

9. The Working Group agreed that the title "Diplomatic Protection" should remain, for it has become a "term of art" in all official languages of the United Nations.

10. The delimitation of the scope of the topic prompted the Working Group to recall a number of principles and distinctions which help to define the

institution of diplomatic protection. Adhering strictly to the content of the topic, the Working Group presents its main aspects as they emerge in international practice.

I. SCOPE OF THE TOPIC

1. Topic confined to secondary rules of international law

11. Just like the topic of State responsibility, the Commission in its study of diplomatic protection should focus on the consequences of an internationally wrongful act (by commission or omission) which has caused an indirect injury to the State usually because of injury to its nationals.

12. Thus the topic will be limited only to codification of secondary rules on the subject: while addressing the requirement of a violation of an international obligation of the State as a prerequisite, it will not address the specific content of those international legal obligations, whether under customary or treaty law.

2. The nature and definition of diplomatic protection

13. On the basis of nationality of natural or legal persons, States claim, as against other States, the right to espouse their cause and act for their benefit when they have suffered injury and/or a denial of justice in another State. In this respect, diplomatic protection has been defined by the international jurisprudence as a right of the State (see, for example, the Mavrommatis Palestine Concessions case, Series A, No. 2, 30 August 1924, and the Panevezys-Saldutiskis Railway case, Series A/B, No. 76, 28 February 1939).

14. From an historical standpoint, it is the link of nationality which provides the basis of a right of protection by the State, although in some cases, by means of an international agreement, a State may be invested with the right to represent another State and act for the benefit of its nationals.

15. The Hague Convention of 1930 stated as a rule that "A State may not afford diplomatic protection to one of its nationals against a State whose nationality such person also possesses". The question may arise as to whether this rule is still applicable and whether the criterion of effective nationality should not also be applied in this case. (Iran-United States case, Series A, No. 18, 6 April 1984). The situation may change in case of protection claimed by international organizations. In the Reparations case, the International Court of Justice stated that the protection claimed by the United Nations is based not upon the nationality of the victim but upon his status as an agent of the organization (I.C.J., Advisory Opinion of 11 July 1949, "Reparations for injuries suffered in the service of the United Nations", 1949, I.C.J. Reports). Therefore it does not matter whether or not the State to which the claim is addressed regards the victim as its own national, because the question of nationality is not pertinent to the admissibility of the claim.

16. A number of issues require further discussion. One is whether diplomatic protection is based solely on a jurisdiction ratione personae over

the beneficiary. A related question is whether, even when an individual declines diplomatic protection from its State of nationality, that State may nevertheless exercise diplomatic protection. Another issue is whether diplomatic protection may be exercised at the discretion of a State, or whether there is a right of a national to diplomatic protection. Yet another issue is whether the topic should cover forms of protection other than claims. Finally, the issue of the application of the rules of diplomatic protection in instances of State succession may be considered.

3. Diplomatic protection concerns indirect injury

17. An injury suffered by a national which is espoused by a State is termed indirect. Such an espousal makes it possible to circumvent the lack of direct access of the nationals to the international sphere. The State then intervenes "to ensure, in the person of its subjects, respect for the rules of international law" (Mavrommatis). When the injury is suffered by an agent of an international organization, the organization may exercise functional protection on his behalf (to protect his rights), without prejudice to the possibility of the national State acting for his benefit by virtue of diplomatic protection (Reparations case).

18. The question also arises as to the type of injury for which an international organization is allowed to exercise protection. In the Reparations case, the International Court of Justice limited the injury for which the organization could demand reparation to one arising from a breach of an obligation designed to help an agent of the organization perform his or her duties (ibid, p. 182). The Working Group, at this stage, takes no position on whether the topic of "diplomatic protection" should include protection claimed by international organizations for the benefit of their agents. Taking into account the relationship between the protection exercised by States and functional protection exercised by international organizations, the Working Group agreed that the latter should be studied, at the initial stage of the work on the topic, in order to enable the Commission to make a decision, one way or another, on its inclusion in the topic.

19. The espousal of the claim by the national State gives it some freedom in the determination with the other State on the form of settlement for reparation, which may also include a lump sum for a group of persons.

II. CONTENT OF THE TOPIC

20. The topic of diplomatic protection deals with at least four major areas: (i) the basis for diplomatic protection, the required linkage between the beneficiary and the States exercising diplomatic protection; (ii) claimants and respondents in diplomatic protection, that is who can claim diplomatic protection against whom; (iii) the conditions under which diplomatic protection may be exercised; and (iv) finally, the consequences of diplomatic protection. The Working Group has identified a number of issues under each of the four main areas for study by the Commission.

Chapter one. Basis for diplomatic protection

A. Natural persons

1. Nationals, continuous nationality

2. Multiple nationals: dominant nationality, genuine link, effective nationality, bona fide nationality

(a) As against third States

(b) As against one of the States of nationality

3. Aliens in the service of the State

4. Stateless persons

5. Non-nationals forming a minority in a group of national claimants

6. Non-nationals with long residence in the State espousing diplomatic protection

7. Non-nationals in the framework of international organizations of integration

B. Legal persons

1. Categories of legal persons

(a) Corporations, and other associations in varying forms in different legal systems

(b) Partnerships

2. Insurers

3. Right of espousal in special cases (factors: nationality of legal persons, theories of control or nationality of share holders)

C. Other cases (ships, aircrafts, spacecrafts, etc.)

D. Transferability of claims

Chapter two. Parties to diplomatic protection (claimants and respondents in diplomatic protection)

A. States

B. International organizations ("functional" protection)

C. Regional economic integration organizations

D. Other entities

Chapter three. The conditions under which diplomatic protection is exercised

A. Preliminary considerations

1. Presumptive evidence of violation of an international obligation by a State

2. The "clean hands" rule

3. Proof of nationality

4. Exhaustions of local remedies

   (a) Scope and meaning

   (b) Judicial, administrative and discretionary remedies

   (c) Exception to the requirement of exhaustion of local remedies

      (i) Demonstrable futility in utilizing local remedies

      (ii) Absence of safety for the claimant in the site where local remedies may be exercised

      (iii) Espousal of large numbers of similar claims

5. Lis alibi pendens

6. The impact of the availability of alternative international remedies

   (a) Right of recourse to human rights bodies

   (b) Right of recourse to international tribunals in the field of foreign investment

   (c) Other procedural obligations

7. The question of timeliness; effect of delay in the absence of rules on prescription

B. Presentation of an international claim

1. The relevance of damage as an incidence of the claim

2. The rule of nationality of claims

C. The circumstances under which a State is deemed to have espoused a claim for diplomatic protection

D. Renunciation of diplomatic protection by an individual

Chapter four. Consequences of diplomatic protection

A. Accord and satisfaction

B. Creation of a jurisdiction to determine and liquidate claims

C. Lump-sum settlements

D. Elimination or suspension of private rights

E. Effect on settlements of subsequent discovery of mistake, fraud, etc.

III. FUTURE WORK OF THE COMMISSION

21. The Working Group recommends the appointment of a Special Rapporteur for the topic at the present session. The Special Rapporteur will present a preliminary report at the next session of the Commission on the basis of the outline proposed by the Working Group. The Working Group also suggests that the Commission attempt to complete the first reading of the topic by the end of the present quinquennium.

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STATE RESPONSIBILITY

Report of the Working Group

1. At its 2477th meeting, on 15 May 1997, the Commission established a Working Group on State Responsibility 1/ to address matters dealing with the second reading of the topic.

2. The Working Group held two meetings from 20 May to 30 June.

3. Since the topic deals with a number of important and delicate issues and Governments had not yet responded to the request for written comments (which were requested by 1 January 1998), the Working Group decided to limit its discussion to certain procedural and methodological issues viz. (i) the work plan of the topic within the present quinquennium; (ii) identification of any areas where more work was required, e.g. in the light of developments since the provisional adoption of the draft article in question; and (iii) the procedures to be followed for the second reading.

4. As regards the first issue, the Working Group agreed that the Commission should design its work plan for the quinquennium with a view to allowing the completion of the second reading of the topic of State responsibility by the end of its quinquennium. To this end it is recommended that the Commission give appropriate priority to this topic during the quinquennium.

5. As regards the second issue, the Working Group agreed that the Commission, taking into account comments by Governments and having regard to the significant links which exist between various key issues should consider in 1999, if possible, the character of the draft articles.

1/ Mr. J. Crawford (Chairman), Mr. I. Brownlie, Mr. J. Dugard, Mr. Q. He, Mr. P. Kabatsi, Mr. J. Kateka, Mr. T. Melescanu, Mr. D. Opertti-Badan, Mr. G. Pambou-Tchivounda, Mr. R. Rosenstock, Mr. B. Simma, Mr. C. Yamada and Mr. Z. Galicki (Ex Officio)

6. As regards the third issue, the Working Group agreed on the following procedure:

(1) The Commission should follow the usual practice of the appointment of a Special Rapporteur to prepare reports for consideration by the Commission, bearing in mind in particular that a significant amount of intersessional work will be required;

(2) The Commission should proceed to the appointment of a Special Rapporteur for the topic at the present session.

(3) In its consideration of the topic, the Commission should follow the usual practice of debates in plenary followed by reference of articles to the Drafting Committee. In addition, and to expedite its work on the topic, the Commission, following its recommendations for its methods of work, [2] should establish working groups to consider and report on key issues.

(4) As regards the treatment of key issues, the Working Group agreed that comments by Governments are of particular relevance. In addition, an examination of case law and literature could also serve as a useful guide in determining whether there are any lacunae in the articles, or whether particular articles may require modification in the light of recent developments in international law. The latter was found particularly relevant to the articles of Part One completed in 1980.

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[2] See Official Records of the General Assembly, Fifty-first Session, Supplement No. 10 (A/51/10), paras. 203-220.

Annex */

Proposed Timetable of Work (1997-2001)

NOTE: Consideration needs to be given as to the strategy of reporting to the Sixth Committee. It is suggested that one major opportunity be given for discussion and feedback in 1999, but that in other years only brief and general reports on progress should be included in the Commission's Report.

1997:	Working Group; Appointment of Special Rapporteur
1 January 1998:	Due date for State Comments on Draft Articles
1998:	First Report (Part 1, review of draft articles (except Article 19): overview of issues relating to State crimes)
	Plenary debate on First Report: reference of initial articles to Drafting Committee Working Group (preliminary consideration of form of draft articles; possible approaches to State crimes)
	Consideration (time permitting) of initial Part 1 articles by Drafting Committee
	Plenary consideration of report of Working Group and (if applicable) Drafting Committee
1999:	Second Report (Article 19 and Part 2 (except countermeasures); overview of issues relating to countermeasures)
	Plenary debate on Second Report: reference of remaining articles in Part 1 and, if possible, Part 2 (except countermeasures) to Drafting Committee
	Substantial consideration of Parts 1 and 2 in Drafting Committee
	Working Group (possible approaches to countermeasures)
	Plenary consideration of reports of Working Group and Drafting Committee; (possibly) provisional adoption of revised Part 1 and commentaries
2000:	Third Report (Countermeasures, overview of issues relating to settlement of disputes)

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*/ The proposed timetable is to facilitate the work of the Planning Group in designing the Commission's work plan for the quinquennium.

Plenary debate on Third Report: reference of remaining Articles in Part 2 to Drafting Committee

Substantial consideration of any remaining articles in Part 1, and of Part 2, in Drafting Committee

Working Group (settlement of disputes; other outstanding issues)

Plenary consideration of reports of Working Group and Drafting Committee; (possibly) provisional adoption of Revised Part 2 and commentaries

2001: Fourth Report (Part 3; any other outstanding issues)

Plenary debate on Fourth Report; reference of Part 3 to Drafting Committee

Completion of Draft Articles by Drafting Committee

Plenary consideration of Report of Drafting Committee; adoption of Draft Articles and Commentary, and of Commission's resolution thereon.

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DRAFT REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-NINTH SESSION

Rapporteur: Mr. Zdzislaw Galicki

CHAPTER II

NATIONALITY IN RELATION TO THE SUCCESSION OF STATES

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C. Text of the draft articles on Nationality of natural persons in relation to the succession of States provisionally adopted by the Commission on first reading . . . . .

1. Text of the draft articles . . . . . .

2. Text of the draft articles with commentaries thereto . . . . .

GE.97-62325 (E)

A. Introduction

1. At its forty-fifth session, in 1993, the Commission decided to include in its agenda the topic entitled "State succession and its impact on the nationality of natural and legal persons". 1/ The General Assembly endorsed the Commission's decision in paragraph 7 of resolution 48/31 of 9 December 1993, on the understanding that the final form to be given to the work on the topic shall be decided after a preliminary study is presented to the Assembly. At its forty-sixth session, in 1994, the Commission appointed Mr. Václav Mikulka Special Rapporteur for the topic. 2/ In paragraph 6 of its resolution 49/51 of 9 December 1994, the General Assembly endorsed the intention of the Commission to undertake work on the topic, on the above-mentioned understanding.

2. At its forty-seventh session, the Commission had before it the Special Rapporteur's first report (A/CN.4/467). Following its consideration of the report, the Commission established a Working Group on the topic entrusted with the mandate to identify issues arising out of the topic, categorize those issues which are closely related thereto, give guidance to the Commission as to which issues could be most profitably pursued given contemporary concerns and present the Commission with a calendar of action. 3/ The Working Group submitted a report to the Commission, containing a number of preliminary conclusions regarding the impact of State succession on the nationality of natural persons. 4/

3. At its forty-eighth session, the Commission considered the Special Rapporteur's second report (A/CN.4/474 and Corr.1 and Corr.2 (Chinese only)).

1/ Official Records of the General Assembly, Forty-eighth session, Supplement No. 10 (A/48/10), para. 440.

2/ Ibid., Forty-ninth session, Supplement No. 10 (A/49/10), para. 383.

3/ Ibid., Fiftieth session, Supplement No. 10 (A/50/10), para. 147.

4/ Ibid., Annex.

It reconvened the Working Group, which completed its task. On the basis of the latter's conclusions, the Commission decided to recommend to the General Assembly that it take note of the completion of the preliminary study of the topic and request the Commission to undertake the substantive study of the topic entitled "Nationality in relation to the succession of States" in accordance with the proposed plan of action. 5/ The General Assembly endorsed the Commission's recommendations in paragraph 8 of resolution 51/160 of 16 December 1996.

B. Consideration of the topic at the present session

4. At the present session, the Commission had before it the Special Rapporteur's third report (A/CN.4/480 and Corr.1 (French only) and Add.1 and Corr.1 and Corr. 2 (French only)), containing a set of 25 draft articles with commentaries on the nationality of natural persons in relation to the succession of States. The draft articles were divided into two Parts, Part I on "General principles concerning nationality in relation to the

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5/ The Commission proposed the following plan of action:

(a) consideration of the question of the nationality of natural persons will be separated from that of the nationality of legal persons and that priority will be given to the former;

(b) for present purposes - and without prejudicing a final decision - the result of the work on the question of the nationality of natural persons should take the form of a declaratory instrument consisting of articles with commentaries;

(c) the first reading of such articles should be completed during the forty-ninth, or, at the latest, the fiftieth session of the Commission;

(d) the decision on how to proceed with respect to the question of the nationality of legal persons will be taken upon completion of the work on the nationality of natural persons and in light of the comments that the General Assembly may invite States to submit to it on the practical problems raised by a succession of States in this field.

Ibid., Fifty-first session, Supplement No. 10 (A/51/10), para. 88.

succession of States" and Part II on "Principles applicable in specific situations of succession of States." 6/ The Special Rapporteur also proposed a draft preamble and a provision concerning definitions.

5. The Commission considered the third report at its 2475th to 2486th, and 2488th to 2494th meetings, held from 13 to 30 May, and from 5 to 17 June 1997 and referred the draft articles to the Drafting Committee. 7/

6. The Commission considered the report of the Drafting Committee at its 2495th to 2499th and .... to .... meetings from 18 to 25 June and ... to ... July 1997 and adopted on first reading a draft preamble and

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6/ Part I consisted of the following articles:

article 1 (Right to a nationality), article 2 (Obligation of States concerned to take all reasonable measures to avoid statelessness), article 3 (Legislation concerning nationality and other connected issues), article 4 (Granting of nationality to persons having their habitual residence in another State), article 5 (Renunciation of the nationality of another State as a condition for granting nationality), article 6 (Loss of nationality upon the voluntary acquisition of the nationality of another State), article 7 (The right of option), article 8 (Granting and withdrawal of nationality upon option), article 9 (Unity of families), article 10 (Right of residence), article 11 (Guarantees of the human rights of persons concerned), article 12 (Non-discrimination), article 13 (Prohibition of arbitrary decisions concerning nationality issues), article 14 (Procedures relating to nationality issues), article 15 (Obligation of States concerned to consult and negotiate), article 16 (Other States).

Part II was divided into 4 Sections and contained the following articles:

- Section 1. Transfer of part of the territory: article 17 (Granting of the nationality of the successor State and withdrawal of the nationality of the predecessor State);

- Section 2. Unification of States: article 18 (Granting of the nationality of the successor State);

- Section 3. Dissolution of a State: article 19 (Scope of application); article 20 (Granting of the nationality of the successor States), article 21 (Granting of the right of option by the successor States);

- Section 4. Separation of part of the territory: article 22 (Scope of application), article 23 (Granting of the nationality of the successor State), article 24 (Withdrawal of the nationality of the predecessor State), article 25 (Granting of the right of option by the predecessor and the successor States).

7/ The draft articles were referred to the Drafting Committee as follows: draft preamble and draft provision on definitions at its 2479th meeting, articles 1-3 at its 2481st meeting, articles 4 to 6 at its 2482nd meeting, articles 7 and 8 at its 2484th meeting, articles 9 to 14 at its 2485th meeting, articles 15 and 16 at its 2486th meeting, articles 17 and 18 at its 2489th meeting, articles 19 to 21 at its 2492nd meeting and articles 22 to 25 at its 2494th meeting.

a set of 26 draft articles on Nationality of natural persons in relation to the succession of States.

7. At its ... meeting, the Commission decided, in accordance with articles 16 and 21 of its Statute to transmit the draft articles set out in section C of the present chapter, through the Secretary-General, to Governments for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by [1 January 1999].

C. Text of the draft articles on Nationality of natural persons in relation to the succession of States provisionally adopted by the Commission on first reading

1. Text of the draft articles

[to be completed]

2. Text of the draft articles with commentaries thereto

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Rapporteur: Mr. Zdzislaw Galicki

CHAPTER II

NATIONALITY IN RELATION TO SUCCESSION OF STATES

Addendum

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C. Text of the draft articles on Nationality of natural persons in relation to the succession of States provisionally adopted by the Commission on first reading . . . . . .

1. Text of the draft articles . . . . . .

Draft articles on Nationality of natural persons in relation to the succession of States

PREAMBLE

The General Assembly,

Considering that problems of nationality arising from succession of States are of concern to the international community,

Emphasizing that nationality is essentially governed by internal law within the limits set by international law,

Recognizing that in matters concerning nationality, due account should be taken both of the legitimate interests of States and those of individuals,

Recalling that the Universal Declaration of Human Rights of 1948 proclaimed the right of every person to a nationality,

Recalling also that the International Covenant on Civil and Political Rights of 1966 and the Convention on the Rights of the Child of 1989 recognize the right of every child to acquire a nationality,

Emphasizing that the human rights and fundamental freedoms of persons whose nationality may be affected by a succession of States must be fully respected,

Bearing in mind the provisions of the Convention on the Reduction of Statelessness of 1961, the Vienna Convention on Succession of States in Respect of Treaties of 1978 and the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts of 1983,

Convinced of the need for the codification and progressive development of the rules of international law concerning nationality in relation to the succession of States as a means for ensuring greater juridical security for States and for individuals,

Declares the following:

PART I. GENERAL PROVISIONS

Article 1

Right to a nationality

Every individual who, on the date of the succession of States, had the nationality of the predecessor State, irrespective of the mode of acquisition of that nationality, has the right to the nationality of at least one of the States concerned, in accordance with the present draft articles.

Article 2

Use of terms

For the purposes of the present draft articles:

(a) "succession of States" means the replacement of one State by another in the responsibility for the international relations of territory;

(b) "predecessor State" means the State which has been replaced by another State on the occurrence of a succession of States;

(c) "successor State" means the State which has replaced another State on the occurrence of a succession of States;

(d) "State concerned" means the predecessor State or the successor State, as the case may be;

(e) "third State" means any State other than the predecessor State or the successor State;

(f) "person concerned" means every individual who, on the date of the succession of States, had the nationality of the predecessor State and whose nationality may be affected by such succession;

(g) "date of the succession of States" means the date upon which the successor State replaced the predecessor State in the responsibility for the international relations of the territory to which the succession of States relates.

Article 3

Prevention of statelessness

States concerned shall take all appropriate measures to prevent persons who, on the date of the succession of States, had the nationality of the predecessor State from becoming stateless as a result of such succession.

Article 4

Presumption of nationality

Subject to the provisions of the present draft articles, persons concerned having their habitual residence in the territory affected by the succession of States are presumed to acquire the nationality of the successor State on the date of such succession.

Article 5

Legislation concerning nationality and other connected issues

Each State concerned should, without undue delay, enact legislation concerning nationality and other connected issues arising in relation to the succession of States consistent with the provisions of the present draft

articles. It should take all appropriate measures to ensure that persons concerned will be apprised, within a reasonable time period, of the effect of its legislation on their nationality, of any choices they may have thereunder, as well as of the consequences that the exercise of such choices will have on their status.

Article 6

Effective date

The attribution of nationality in relation to the succession of States shall take effect on the date of such succession. The same applies to the acquisition of nationality following the exercise of an option, if persons concerned would otherwise be stateless during the period between the date of the succession of States and the date of the exercise of such option.

Article 7

Attribution of nationality to persons concerned having their habitual residence in another State

1. Subject to the provisions of article 10, a successor State does not have the obligation to attribute its nationality to persons concerned if they have their habitual residence in another State and also have the nationality of that or any other State.

2. A successor State shall not attribute its nationality to persons concerned who have their habitual residence in another State against the will of the persons concerned unless they would otherwise become stateless.

Article 8

Renunciation of the nationality of another State as a condition for attribution of nationality

When a person concerned who is qualified to acquire the nationality of a successor State has the nationality of another State concerned, the former State may make the attribution of its nationality dependent on the renunciation by such person of the nationality of the latter State. However, such requirement shall not be applied in a manner which would result in rendering the person concerned stateless, even if only temporarily.

Article 9

Loss of nationality upon the voluntary acquisition of the nationality of another State

1. A predecessor State may provide that persons who, in relation to the succession of States, voluntarily acquire the nationality of a successor State shall lose its nationality.

2. A successor State may provide that persons who, in relation to the succession of States, voluntarily acquire the nationality of another successor State or, as the case may be, retain the nationality of the predecessor State shall lose its nationality acquired in relation to such succession.

Article 10

Respect for the will of persons concerned

1. States concerned shall give consideration to the will of persons concerned whenever those persons are qualified to acquire the nationality of two or more States concerned.

2. Each State concerned shall grant a right to opt for its nationality to persons concerned who have appropriate connection with that State if those persons would otherwise become stateless as a result of the succession of States.

3. When persons entitled to the right of option have exercised such right, the State whose nationality they have opted for shall attribute its nationality to such persons.

4. When persons entitled to the right of option have exercised such right, the State whose nationality they have renounced shall withdraw its nationality from such persons, unless they would thereby become stateless.

5. States concerned should provide a reasonable time limit for the exercise of the rights set forth in paragraphs 1 and 2.

Article 11

Unity of a family

Where the acquisition or loss of nationality in relation to the succession of States would impair the unity of a family, States concerned shall take all appropriate measures to allow that family to remain together or to be reunited.

Article 12

Child born after the succession of States

A child of a person concerned, born after the date of the succession of States, who has not acquired any nationality, has the right to the nationality of the State concerned on whose territory that child was born.

Article 13

Status of habitual residents

1. The status of persons concerned as habitual residents shall not be affected by the succession of States.

2. A State concerned shall take all necessary measures to allow persons concerned who, because of events connected with the succession of States, were forced to leave their habitual residence on its territory to return thereto.

Article 14

Non-discrimination

States concerned shall not deny persons concerned the right to retain or acquire a nationality or the right of option upon the succession of States by discriminating on any ground.

Article 15

Prohibition of arbitrary decisions concerning nationality issues

In the application of the provisions of any law or treaty, persons concerned shall not be arbitrarily deprived of the nationality of the predecessor State, or arbitrarily denied the right to acquire the nationality of the successor State or any right of option, to which they are entitled in relation to the succession of States.

Article 16

Procedures relating to nationality issues

Applications relating to the acquisition, retention or renunciation of nationality or to the exercise of the right of option in relation to the succession of States shall be processed without undue delay and relevant decisions shall be issued in writing and shall be open to effective administrative or judicial review.

Article 17

Exchange of information, consultation and negotiation

1. States concerned shall exchange information and consult in order to identify any detrimental effects on persons concerned with respect to their nationality and other connected issues regarding their status as a result of the succession of States.

2. States concerned shall, when necessary, seek a solution to eliminate or mitigate such detrimental effects by negotiation and, as appropriate, through agreement.

Article 18

Other States

1. Nothing in the present draft articles requires States to treat persons concerned having no effective link with a State concerned as nationals of that State, unless this would result in treating those persons as if they were stateless.

2. Nothing in the present draft articles precludes States from treating persons concerned, who have become stateless as a result of the succession of States, as nationals of the State concerned whose nationality they would be entitled to acquire or retain, if such treatment is beneficial to those persons.

PART II. PROVISIONS RELATING TO SPECIFIC CATEGORIES OF SUCCESSION OF STATES

Article 19

Application of Part II

States shall take into account the provisions of Part II in giving effect to the provisions of Part I in specific situations.

SECTION 1

TRANSFER OF PART OF THE TERRITORY

Article 20

Attribution of the nationality of the successor State and withdrawal of the nationality of the predecessor State

When part of the territory of a State is transferred by that State to another State, the successor State shall attribute its nationality to the persons concerned who have their habitual residence in the transferred territory and the predecessor State shall withdraw its nationality from such persons, unless otherwise indicated by the exercise of the right of option which such persons shall be granted.

SECTION 2

UNIFICATION OF STATES

Article 21

Attribution of the nationality of the successor State

Without prejudice to the provisions of article 7, when two or more States unite and so form one successor State, irrespective of whether the

successor State is a new State or whether its personality is identical to that of one of the States which have united, the successor State shall attribute its nationality to all persons who, on the date of the succession of States, had the nationality of a predecessor State.

SECTION 3

DISSOLUTION OF A STATE

Article 22

Attribution of the nationality of the successor States

When a State dissolves and ceases to exist and the various parts of the territory of the predecessor State form two or more successor States, each successor State shall, subject to the provisions of article 23, attribute its nationality to:

(a) persons concerned having their habitual residence in its territory; and

(b) without prejudice to the provisions of article 7:

(i) persons concerned not covered by subparagraph (a) having an appropriate legal connection with a constituent unit of the predecessor State that has become part of that successor State;

(ii) persons concerned having their habitual residence in a third State, who were born in or, before leaving the predecessor State, had their last habitual residence in what has become the territory of that successor State or having any other appropriate connection with that successor State.

Article 23

Granting of the right of option by the successor States

1. Successor States shall grant a right of option to persons concerned covered by the provisions of article 22 who are qualified to acquire the nationality of two or more successor States.

2. Each successor State shall grant a right to opt for its nationality to persons concerned who are not covered by the provisions of article 22.

SECTION 4

SEPARATION OF PART OR PARTS OF THE TERRITORY

Article 24

Attribution of the nationality of the successor State

When part or parts of the territory of a State separate from that State and form one or more successor States while the predecessor State continues to exist, a successor State shall, subject to the provisions of article 26, attribute its nationality to:

(a) persons concerned having their habitual residence in its territory; and

(b) without prejudice to the provisions of article 7:

(i) persons concerned not covered by subparagraph (a) having an appropriate legal connection with a constituent unit of the predecessor State that has become part of that successor State;

(ii) persons concerned having their habitual residence in a third State, who were born in or, before leaving the predecessor State, had their last habitual residence in what has become the territory of that successor State or having any other appropriate connection with that successor State.

Article 25

Withdrawal of the nationality of the predecessor State

1. Subject to the provisions of article 26, the predecessor State shall withdraw its nationality from persons concerned qualified to acquire the nationality of the successor State in accordance with article 24. It shall not, however, withdraw its nationality before such persons acquire the nationality of the successor State.

2. Subject to the provisions of article 26, the predecessor State shall not, however, withdraw its nationality from persons referred to in paragraph 1 who:

(a) have their habitual residence in its territory;

(b) are not covered by subparagraph (a) and have an appropriate connection with a constituent unit of the predecessor State that has remained part of the predecessor State;

(c) have their habitual residence in a third State, and were born in or, before leaving the predecessor State, had their last habitual residence in what has remained part of the territory of the predecessor State or have any other appropriate connection with that State.

Article 26

Granting of the right of option by the predecessor and the successor States

Predecessor and successor States shall grant a right of option to all persons concerned covered by the provisions of articles 24 and 25 who are qualified to have the nationality of both the predecessor and successor States or of two or more successor States.

Article 27 [1]

Cases of succession of States covered by the present draft articles

Without prejudice to the right to a nationality of persons concerned, the present draft articles apply to the effects of a succession of States occurring in conformity with international law and, in particular, with the principles of international law embodied in the Charter of the United Nations.

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[1] The placement of article 27 will be decided at a later stage.

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Rapporteur: Mr. Zdzislaw Galicki

CHAPTER II

NATIONALITY IN RELATION TO SUCCESSION OF STATES

Addendum

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PART I. GENERAL PROVISIONS

Article 1 1/

Right to a nationality

Every individual who, on the date of the succession of States, had the nationality of the predecessor State, irrespective of the mode of acquisition of that nationality, has the right to the nationality of at least one of the States concerned, in accordance with the present draft articles.

Commentary

(1) Article 1 is a key provision, the very foundation of the present draft articles. It states the main principle from which other draft articles are derived. The core element of this article is the recognition of the right to a nationality in the exclusive context of a succession of States. Thus, it applies to this particular situation the general principle contained in article 15 of the Universal Declaration of Human Rights, which was the first international instrument embodying the "right of everyone to a nationality".

(2) The Commission acknowledged that the positive character of article 15 has been disputed in the doctrine. 2/ It has been argued, in particular, that it is not possible to determine the State vis-à-vis which a person would be entitled to present a claim for nationality, i.e. the addressee of the obligation corresponding to such a right. 3/ However, in the case of a succession of States, it is possible to identify such State. It is either the successor State, or one of the successor States when there are more than one, or, as the case may be, the predecessor State.

1/ Article 1 corresponds to article 1, paragraph 1, proposed by the Special Rapporteur in his Third report, document A/CN.4/480, p. 35.

2/ See Johannes M.M. Chan, "The right to a nationality as a human right: The current trend towards recognition", Human Rights Law Journal, vol. 12, Nos. 1-2 (1991), pp. 1-14.

3/ See the comment by Rezek, according to whom article 15 of the Universal Declaration sets out a "rule which evokes unanimous sympathy, but which is ineffective, as it fails to specify for whom it is intended". José Francisco Rezek, "Le droit international de la nationalité", Recueil des cours ... 1986-III, vol. 198, p. 354.

(3) The right embodied in article 1 in general terms is given more concrete form in subsequent provisions, as indicated by the phrase "in accordance with the present draft articles". This article cannot therefore be read in isolation.

(4) The identification of the State which is under the obligation to attribute its nationality depends mainly on the type of succession of States and the nature of the links that persons referred to in article 1 may have with one or more States involved in the succession. In most cases, such persons have links with only one of the States involved in a succession. Unification of States is a situation where a single State - the successor State - is the addressee of the obligation to attribute its nationality to these persons. In other types of succession of States, such as dissolution, separation or transfer of territory, the major part of the population has also most, if not all, of its links to one of the States involved in the territorial change: it falls within the category of persons resident in the territory where they were born and with which they are bound by many other links, including family and professional ties, etc.

(5) In certain cases, however, persons may have links to two or even more States involved in a succession. In this event, a person might either end up with the nationality of two or more of these States or, as a result of a choice, end up with the nationality of only one of them. Under no circumstances, however, shall a person be denied the right to acquire at least one such nationality. This is the meaning of the phrase "has the right to the nationality of at least one of the States concerned". The recognition of the possibility of multiple nationality resulting from a succession of States does not mean that the Commission intended to encourage a policy of dual or multiple nationality. The draft articles in their entirety are completely neutral on this question, leaving it to the discretion of each and every State.

(6) Another element which is stated expressly in article 1 is that the mode of acquisition of the predecessor State's nationality has no effect on the scope of the right of the persons referred to in this provision to a nationality. It is irrelevant in this regard whether they have acquired the nationality of the predecessor State at birth, by virtue of the principles of

jus soli or jus sanguinis, or by naturalization, or even as a result of a previous succession of States. 4/ They are all equally entitled to a nationality under the terms of this article.

Article 2 5/

Use of terms

For the purposes of the present draft articles:

(a) "succession of States" means the replacement of one State by another in the responsibility for the international relations of territory;

(b) "predecessor State" means the State which has been replaced by another State on the occurrence of a succession of States;

(c) "successor State" means the State which has replaced another State on the occurrence of a succession of States;

(d) "State concerned" means the predecessor State or the successor State, as the case may be;

(e) "third State" means any State other than the predecessor State or the successor State;

(f) "person concerned" means every individual who, on the date of the succession of States, had the nationality of the predecessor State and whose nationality may be affected by such succession;

(g) "date of the succession of States" means the date upon which the successor State replaced the predecessor State in the responsibility for the international relations of the territory to which the succession of States relates.

4/ As stated in the comment to article 18 of the 1929 Draft Convention on Nationality prepared by Harvard Law School's Research on International Law, "there is no reason whatsoever for drawing a distinction between persons who have acquired nationality at birth and those who have acquired nationality through some process of naturalization prior to the [succession]". (Comments to the 1929 Harvard Draft Convention on Nationality, American Journal of International Law, vol. 23 (Special Suppl.) (1929), p. 63).

5/ Article 2 corresponds to the definitions proposed by the Special Rapporteur in footnote * of his Third report, document A/CN.4/480, p. 19.

Commentary

(1) The definitions in subparagraphs (a), (b), (c), (e) and (g) are identical to the respective definitions contained in article 2 of the two Vienna Conventions on the succession of States. The Commission decided to leave these definitions unchanged so as to ensure consistency in the use of terminology in its work on questions relating to the succession of States. 6/ The definitions contained in subparagraphs (d) and (f) have been added by the Commission for the purposes of the present topic.

(2) The term "succession of States", as the Commission already explained in 1974 in its commentary to this definition, is used "as referring exclusively to the fact of the replacement of one State by another in the responsibility for the international relations of territory, leaving aside any connotation of inheritance of rights or obligations on the occurrence of that event". 7/ Unlike the previous work of the Commission relating to the succession of States, the present draft articles deal with the effects of such succession on the legal bond between a State and individuals. It is therefore to be noted that the said replacement of one State by another generally connotes replacement of one jurisdiction by another with respect to the population of the territory in question, which is of primary importance for the present topic.

(3) As in the case of the Commission's previous work on the topic of the succession of States, the current draft articles relate only to cases of "succession of States occurring in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations". 8/

6/ See also the earlier position of the Commission on this point. Yearbook ... 1981, vol. II (Part Two), p. 22, document A/36/10, para. (4) of the commentary to article 2 of the draft articles on succession of States in respect of State property, archives and debts.

7/ Yearbook ... 1974, vol. II (Part One), p. 175, document A/9610/Rev.1, para. (3) of the commentary to article 2 of the draft articles on succession of States in respect of treaties.

8/ See article 6 of the Vienna Convention on Succession of States in respect of Treaties and article 3 of the Vienna Convention on Succession of States in respect of State Property, Archives and Debts. As stated in the commentary to article 6 of the draft articles on succession of States in respect of treaties, the Commission "in preparing draft articles for the codification of the rules of general international law normally assumes that

(4) The meanings attributed to the terms "predecessor State", "successor State" and "date of the succession of States" are merely consequential upon the meaning given to "succession of States". It must be observed that, in some cases of succession, such as transfer of territory or separation of part of the territory, the predecessor State is not replaced in its entirety by the successor State, but only in respect of the territory affected by the succession.

(5) Subparagraph (d) provides the definition of the term "State concerned", by which, depending on the type of the territorial change, are meant the States involved in a particular case of "succession of States". These are the predecessor State and the successor State in the case of a transfer of part of the territory (art. 20), the successor State alone in the case of a unification of States (art. 21), two or more successor States in the case of a dissolution of States (arts. 22 and 23) and the predecessor State and one or more successor States in the case of a separation of part of the territory (arts. 24 to 26). The term "State concerned" has nothing to do with the "concern" that any other State might have about the outcome of a succession of States in which its own territory is not involved.

(6) Subparagraph (f) provides the definition of the term "person concerned". The Commission considered it necessary to include such a definition, since the inhabitants of the territory affected by the succession of States may include, in addition to the nationals of the predecessor State, nationals of third States and stateless persons residing in that territory on the date of the succession.

(7) It is generally recognized, that "[p]ersons habitually resident in the absorbed territory who are nationals of [third] States and at the same time not nationals of the predecessor State cannot be invested with the successor's nationality. On the other hand, stateless persons so resident there are in the same position as born nationals of the predecessor State. There is an 'inchoate right' on the part of any State to naturalize stateless

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those [draft] articles are to apply to facts occurring and situations established in conformity with international law ... . Only when matters not in conformity with international law call for specific treatment or mention does it deal with facts or situations not in conformity with international law". Yearbook ... 1972, vol. II, p. 236, document A/8710/Rev.1.

persons resident upon its territory". 9/ Nevertheless, even the status of the latter category of persons is different from that of the persons who were the nationals of the predecessor State on the date of the succession.

(8) Accordingly, the term "person concerned" includes neither nationals of third States nor stateless persons who where present on the territory of any of the "States concerned". It encompasses only individuals who, on the date of the succession of States, had the nationality of the predecessor State and whose nationality may thus be affected by that particular succession of States. By "persons whose nationality may be affected", the Commission means all individuals who could potentially lose the nationality of the predecessor State or, respectively, acquire the nationality of the successor State, depending on the type of succession of States.

(9) Determining the category of individuals affected by the loss of the nationality of the predecessor State is easy in the event of total succession, when the predecessor State or States disappear as a result of the change of sovereignty: all individuals having the nationality of the predecessor State lose this nationality as an automatic consequence of that State's disappearance. But determining the category of individuals susceptible of losing the predecessor State's nationality is quite complex in the case of partial succession, when the predecessor State survives the change. In the latter case, it is possible to distinguish among at least two main groups of individuals having the nationality of the predecessor State: persons residing in the territory affected by the change of sovereignty on the date of succession of States (a category which comprises those born therein and those born elsewhere but having acquired the predecessor's nationality at birth or by naturalization) and those born in the territory affected by the change or having another appropriate connection with such territory, but not

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9/ O'Connell (1956), op. cit., pp. 257-258. Similarly, it was held in Rene Masson v. Mexico that the change of sovereignty affects only nationals of the predecessor State, while the nationality of other persons residing in the territory at the time of the transfer is not affected. (John Basset Moore, International Arbitrations to which the United States has been a Party, vol. 3, pp. 2542-2543.)

residing therein on the date of the change. Within the last category, a distinction must be made between those individuals residing in the territory which remains part of the predecessor State and those individuals residing in a third State.

(10) The delimitation of the categories of persons susceptible of acquiring the nationality of the successor State is also multifaceted. In the event of total succession, such as the absorption of one State by another State or the unification of States, when the predecessor State or States respectively cease to exist, all nationals of the predecessor State or States are candidates for the acquisition of the nationality of the successor State. In the case of the dissolution of a State, the situation becomes more complicated owing to the fact that two or more successor States appear and the range of individuals susceptible of acquiring the nationality of each particular successor State has to be defined separately. It is obvious that there will be overlaps between the categories of individuals susceptible of acquiring the nationality of the different successor States. Similar difficulties will arise with the delimitation of the categories of individuals susceptible of acquiring the nationality of the successor State in the event of secession or transfer of a part or parts of territory. This is a function of the complexity of the situations and the need to respect the will of persons concerned.

(11) The definition in subparagraph (f) is restricted to the clearly circumscribed category of persons who had in fact the nationality of the predecessor State. The Commission might consider at a later stage whether it is necessary to deal, in a separate provision, with the situation of those persons who, having fulfilled the necessary substantive requirements for acquisition of such nationality were unable to complete the procedural stages involved because of the occurrence of the succession.

(12) The Commission decided not to define the term "nationality" in article 2, given the very different meanings attributable to it. In any case, it is felt that such a definition is not indispensable for the purposes of the draft articles.

(13) One member of the Commission expressed reservations on the definition contained in subparagraph (f), for, in his view, it should have also included the criterion of habitual residence in the territory affected by the succession.

Article 3 10/

Prevention of statelessness

States concerned shall take all appropriate measures to prevent persons who, on the date of the succession of States, had the nationality of the predecessor State from becoming stateless as a result of such succession.

Commentary

(1) The obligation of the States involved in the succession to take all appropriate measures in order to prevent the occurrence of statelessness is a corollary of the right of the persons concerned to a nationality. As has been stated by experts of the Council of Europe, "it is a responsibility of States to avoid statelessness"; 11/ this was one of the main premises on which they based their examination of nationality laws in recent cases of succession of States in Europe.

(2) The growing awareness among States of the compelling need to fight the plight of statelessness has led to the adoption, since 1930, of a number of multilateral treaties relating to this problem, such as the 1930 Hague Convention on Certain Questions relating to the Conflict of Nationality Laws, 12/ its Protocol relating to a Certain Case of Statelessness and its Special Protocol concerning Statelessness, as well as the 1954 Convention relating to the Status of Stateless Persons 13/ and the 1961 Convention on the Reduction of Statelessness. 14/ It is true that only very few provisions of the above Conventions directly address the issue of nationality in the context of succession of States. Nevertheless, they

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10/ Article 3 corresponds to article 2 proposed by the Special Rapporteur in his Third report, document A/CN.4/480, p. 40.

11/ See "Report of the Experts of the Council of Europe on the Citizenship Laws of the Czech Republic and Slovakia and their Implementation", Strasbourg, 2 April 1996, para. 54.

12/ See Laws concerning nationality, op. cit., p. 567.

13/ United Nations, Treaty Series, vol. 360, p. 117.

14/ Ibid., vol. 989, p. 175.

provide useful guidance to the States concerned by offering solutions which can mutatis mutandis be used by national legislators in search of solutions to problems arising from territorial change.

(3) An obvious solution consists in adopting legislation which ensures that no person having an appropriate connection to a State is excluded from the circle of persons to whom that State grants its nationality. It is, however, mainly in the regulation of conditions regarding the loss of nationality that the concern of avoiding statelessness is apparent. In the literature, it has thus been observed that the renunciation of nationality not conditioned by the acquisition of another nationality has become obsolete. 15/

(4) A technique used by the legislators of States concerned in the case of a succession of States is to enlarge the circle of persons entitled to acquire their nationality by granting a right of option to that effect to those who would otherwise become stateless. Examples of provisions of this nature include section 2, subsection (3), of the Burma Independence Act, article 6 of the Law on Citizenship of the Czech Republic, and article 47 of the Yugoslav Citizenship Law (No. 33/96). 16/

(5) The effectiveness of national legislations in preventing statelessness is, however, limited. A more effective measure is for States concerned to conclude an agreement by virtue of which the occurrence of statelessness would be precluded. This is also the philosophy underlying article 10 of the 1961 Convention on the Reduction of Statelessness. 17/

15/ Henri Batiffol and Paul Lagarde, Droit international privé, 7th ed., vol. I (Paris, Librairie générale de droit et de jurisprudence, 1981), pp. 82-83.

16/ See Third report on nationality in relation to the succession of States, document A/CN.4/480 and Corr.1 (French only), p. 42, paras. (6) to (8) of the commentary to draft article 2 proposed by the Special Rapporteur.

17/ Article 10 reads as follows:

"1. Every treaty between Contracting States providing for the transfer of territory shall include provisions designed to secure that no person shall become stateless as a result of the transfer. A Contracting State shall use its best endeavours to secure that any such treaty made by it with a State which is not a Party to this Convention includes such provisions.

"2. In the absence of such provisions a Contracting State to which territory is transferred or which otherwise acquires

(6) Article 3 does not set out an obligation of result, but an obligation of conduct. In the case of unification of States, this distinction has no practical significance, for the obligation to take all appropriate measures to prevent persons concerned from becoming stateless means, in fact, the obligation of the successor State to attribute its nationality in principle to all such persons. 18/ However, the distinction between obligation of result and obligation of conduct is relevant in other cases of succession of States where at least two States concerned are involved. Obviously, one cannot consider each particular State concerned to be responsible for all cases of statelessness resulting from the succession. A State can reasonably be asked only to take appropriate measures within the scope of its competence as delimited by international law. Accordingly, when there are more than one successor States, they do not each have the obligation to attribute their nationality to every single person concerned. Similarly, the predecessor State does not have the obligation to retain all persons concerned as its nationals. Otherwise, the result would be, first, dual or multiple nationality on a large scale and, second, the creation, also on a large scale, of legal bonds of nationality without appropriate connection.

(7) Thus, the principle stated in article 3 cannot be more than a general framework upon which other, more specific, obligations are based. The elimination of statelessness is a final result to be achieved by means of the application of the entire set of draft articles, in particular through coordinated action of States concerned.

(8) As is the case with the right to a nationality set out in article 1, statelessness is to be prevented under article 3 in relation to persons who, on the date of the succession of States, were nationals of the predecessor State, i.e. "persons concerned" as defined in article 2, subparagraph (f). The Commission decided, for stylistic reasons, not to use the term "person concerned" in article 3, so as to avoid a juxtaposition of the expressions "States concerned" and "persons concerned".

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territory shall confer its nationality on such persons as would otherwise become stateless as a result of the transfer or acquisition."

18/ This obligation is limited by the provisions of article 7.

(9) Article 3 does not therefore encompass persons resident in the territory of the successor State who had been stateless under the regime of the predecessor State. The successor State has certainly a discretionary power to attribute its nationality to such stateless persons. But this question is outside the scope of the present draft articles.

Article 4

Presumption of nationality

Subject to the provisions of the present draft articles, persons concerned having their habitual residence in the territory affected by the succession of States are presumed to acquire the nationality of the successor State on the date of such succession.

Commentary

(1) The purpose of article 4 is to address the problem of the time-lag between the date of the succession of States and the adoption of legislation or, as the case may be, the conclusion of a treaty between States concerned on the question of the nationality of persons concerned following the succession. Since such persons run the risk of being treated as stateless during this period, the Commission felt it important to state, as a presumption, the principle that, on the date of the succession of States, the successor State attributes its nationality to persons concerned who are habitual residents of the territory affected by such succession.

(2) This is, however, a rebuttable presumption. Its limited scope is expressed by the opening clause "subject to the provisions of the present draft articles", which clearly indicates that the function of this principle must be assessed in the overall context of the other draft articles. Accordingly, when their application leads to a different result, as may happen, for example, when a person concerned opts for the nationality of the predecessor State or of a successor State other than the State of habitual residence, the presumption ceases to operate.

(3) The presumption stated in article 4 underlies the solutions envisaged in Part II for different types of succession of States, which, as indicated by article 19, have a residual character. Thus, where questions of nationality are regulated by a treaty between States concerned, as envisaged in article 17, the provisions of such treaty may also rebut the presumption of the acquisition of the nationality of the State of habitual residence.

(4) As regards the criterion on which this presumption relies, it derives from the application of the principle of effective nationality to the specific case of the succession of States. As Rezek has stressed, "the juridical relationship of nationality should not be based on formality or artifice, but on a real connection between the individual and the State." 19/ Habitual residence is the test that has most often been used in practice for defining the basic body of nationals of the successor State, even if it was not the only one. 20/ This is explained by the fact that "the population has a 'territorial' or local status, and this is unaffected whether there is a universal or partial successor and whether there is a cession, i.e., a 'transfer' of sovereignty, or a relinquishment by one State followed by a disposition by international authority". 21/ Also, in the view of experts of the Office of the United Nations High Commissioner for Refugees (UNHCR), "there is substantial connection with the territory concerned through residence itself." 22/

19/ Rezek, op. cit., p. 357.

20/ O'Connell termed it "the most satisfactory test". D.P. O'Connell, State Succession in Municipal Law and International Law, vol. I (Cambridge, United Kingdom, Cambridge University Press, 1967), p. 518. See also the decision by an Israeli court concerning the 1952 law on Israeli nationality, according to which "[s]o long as no law has been enacted providing otherwise ... every individual who, on the date of the establishment of the State of Israel was resident in the territory which today constitutes the State of Israel, is also a national of Israel. Any other view must lead to the absurd result of a State without nationals - a phenomenon the existence of which has not yet been observed." (Ian Brownlie, "The Relations of Nationality in Public International Law", British Year Book of International Law, vol. 39 (1963), p. 318.) In another case, however, it was held that Israeli nationality had not existed prior to the adoption of the law in question. (Ibid.)

21/ Ian Brownlie, Principles of Public International Law, 4th ed. (Oxford, Clarendon Press, 1990), p. 665.

22/ "The Czech and Slovak citizenship laws and the problem of statelessness", document prepared by UNHCR, February 1996, para. 29. As it has also been noted, "it is in the interest of the successor State ... to come as close as possible, when defining its initial body of citizens, to the definition of persons having a genuine link with that State. If a number of persons are considered to be 'foreigners' in 'their own country' clearly that is not in the interest of the State itself." Report of the Experts of the Council of Europe on the Citizenship Laws, op. cit., para. 144.

Article 5 23/

Legislation concerning nationality and other connected issues

Each State concerned should, without undue delay, enact legislation concerning nationality and other connected issues arising in relation to the succession of States consistent with the provision of the present draft articles. It should take all appropriate measures to ensure that persons concerned will be apprised, within a reasonable time period, of the effect of its legislation on their nationality, of any choices they may have thereunder, as well as of the consequences that the exercise of such choices will have on their status.

Commentary

(1) Article 5 is based on the recognition of the fact that, in the case of a succession of States, in spite of the role reserved to international law, domestic legislation with regard to nationality has always an important function. The main focus of this article, however, is the issue of the timeliness of internal legislation. In this respect, the practice of States varies. While in some cases the legislation concerning nationality was enacted at the time of the succession of States, 24/ in other cases the nationality laws were enacted after the date of the succession, sometimes even much later. 25/ The term "legislation" as used in this article should be interpreted broadly: it includes more than the texts drafted by Parliament. 26/

(2) It would not be realistic in many cases to expect States concerned to enact such legislation at the time of the succession. In some situations, for instance where new States are born as a result of a turbulent process and

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23/ Article 5 corresponds to article 3, paragraph 1, proposed by the Special Rapporteur in his Third report, document A/CN.4/480, p. 45.

24/ This was the case of a number of newly independent States. See Materials on succession of States in respect of matters other than treaties, United Nations Legislative Series, ST/LEG/SER.B/17, passim. For more recent examples, see, e.g., the Law on Acquisition and Loss of Citizenship of the Czech Republic of 29 December 1992, enacted in parallel to the dissolution of Czechoslovakia, and the Law on Croatian Nationality of 28 June 1991, enacted in parallel to the proclamation of the independence of Croatia.

25/ See, e.g., the Law on Israeli Nationality of 1952, referred to in footnote [20] above.

26/ See a similar interpretation by Rezek of the notion of legislation in relation to nationality, op. cit., p. 372.

territorial limits are unclear, this would even be impossible. Accordingly, article 5 sets out a recommendation that States concerned enact legislation concerning nationality and other connected issues arising in relation with the succession of States "without undue delay". The period which meets such test may be different for each State concerned, even in relation to the same succession. Indeed, the situation of a predecessor State and a successor State born as a result of separation may be very different in this regard. For example, the question of the loss of the nationality of the predecessor State may be already adequately addressed by pre-existing legislation. 27/

(3) The Commission considered it necessary to state explicitly that the legislation to be enacted by States concerned should be "consistent with the provisions of the present draft articles". This underscores the importance of respect for the principles set out in the draft articles, to which States are urged to give effect through their domestic legislation. This is without prejudice to the obligations that States concerned may have under the terms of any relevant treaty. 28/

(4) The legislation envisaged under article 5 is not limited to the questions of attribution or withdrawal of nationality in a strict sense, and, where appropriate, the question of the right of option. It should also address "connected issues", i.e. issues which are intrinsically consequential to the change of nationality upon a succession of States. These may include such matters as the right of residence, the unity of families, military obligations, pensions and other social security benefits, etc. States concerned may find it preferable to regulate such matters by means of a treaty, 29/ a possibility that article 5 in no way precludes.

27/ See Second report on State succession and its impact on the nationality of natural and legal persons, document A/CN.4/474, para. 89, as regards the cession by Finland of part of its territory to the Soviet Union in 1947.

28/ The principle that "the contractual stipulations between the two [States concerned] ... shall always have preference" over the legislation of States involved in the succession is also embodied in Article 13 of the Bustamante Code. See "Code of Private International Law" (Code Bustamante), League of Nations, Treaty Series, vol. LXXXVI, No. 1950.

29/ For examples of such practice, see Third report on nationality in relation to the succession of States, document A/CN.4/480, footnote 282.

(5) The second sentence of article 5 reflects the importance that the Commission attaches to ensuring that persons concerned are not reduced to a purely passive role as regards the impact of the succession of States on their individual status or confronted with adverse effects of the exercise of a right of option of which they could objectively have no knowledge when exercising such right. This issue arises, of course, only when a person concerned finds itself having ties with more than one State concerned. The reference to "choices" should be understood in a broader sense than simply the option between nationalities. The measures to be taken by States should be "appropriate" and timely, so as to ensure that any rights of choice to which persons concerned may be entitled under their legislation are indeed effective.

(6) Given the complexity of the problems involved, and the fact that certain "connected issues" may sometimes only be resolved by means of a treaty, article 5 is couched in terms of a recommendation. Some members, however, considered that the formulation of the first sentence of article 5 in terms of an obligation was more appropriate.

Article 6 30/

Effective date

> The attribution of nationality in relation to the succession of States shall take effect on the date of such succession. The same applies to the acquisition of nationality following the exercise of an option, if persons concerned would otherwise be stateless during the period between the date of the succession of States and the date of the exercise of such option.

Commentary

(1) The Commission recognized that one of the general principles of law is the principle of non-retroactivity of legislation. As regards nationality issues, this principle has an important role to play, for as stated by Lauterpacht, "[w]ith regard to questions of status, the drawbacks of retroactivity are particularly apparent." 31/ However, the Commission

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30/ Article 6 corresponds to article 3, paragraph 1, proposed by the Special Rapporteur in his Third report, document A/CN.4/480, p. 45.

31/ Hersch Lauterpacht, "The Nationality of Denationalized Persons", The Jewish Yearbook of International Law (1948), p. 168.

considered that, in the particular case of a succession of States, the benefits of retroactivity justify an exception to the above general principle, notwithstanding the fact that the practice of States is inconclusive in this respect.

(2) Article 6 is closely connected to the issue dealt with in article 5. It has however, a broader scope of application, as it covers the attribution of nationality not only on the basis of legislation, but also on the basis of a treaty. If such attribution of nationality after the date of the succession of States did not have a retroactive effect, statelessness, even if only temporary, could ensue. Under the terms of article 6, the retroactive effect extends to the acquisition of nationality following the exercise of an option, provided that persons concerned would otherwise be stateless during the period between the date of the succession of States and the date of the exercise of such option. The Commission decided to formulate this article in terms of obligations incumbent on States concerned, in particular to ensure consistency with the obligations of such States with a view to preventing statelessness under article 3.

(3) Article 6 is the first article where the expression "attribution of nationality" is used. The Commission considered it preferable, in the present draft articles, to use this term rather than the term "granting" to refer to the act of the conferral by a State of its nationality to an individual. It was felt that the term "attribution" best conveyed the point that the acquisition of nationality upon a succession of States is distinct from the process of acquisition of nationality by naturalization. Where a provision is drafted from the perspective of the individual, the Commission has used the expression "acquisition of nationality".

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Rapporteur: Mr. Zdzislaw Galicki

CHAPTER II

NATIONALITY IN RELATION TO SUCCESSION OF STATES

Addendum

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Article 7 32/

Attribution of nationality to persons concerned having their habitual residence in another State

1. Subject to the provisions of article 10, a successor State does not have the obligation to attribute its nationality to persons concerned if they have their habitual residence in another State and also have the nationality of that or any other State.

2. A successor State shall not attribute its nationality to persons concerned who have their habitual residence in another State against the will of the persons concerned unless they would otherwise become stateless.

Commentary

(1) The attribution of the nationality of the successor State is subject to certain exceptions of a general character which apply to all types of succession of States. These exceptions, spelled out in article 7, concern both the obligation of the successor State to attribute its nationality and the power of the State to do so. Their purpose is to establish a balance between the competing jurisdictions of the successor State and other States where persons concerned have their habitual residence outside the former while still pursuing the goal of preventing statelessness.

(2) This question has been widely debated in the doctrine, an analysis of which leads to the following two conclusions: first, a successor State does not have the obligation to attribute its nationality to the persons concerned who would otherwise satisfy all the criteria required for acquiring its nationality but who have their habitual residence in a third State and also have the nationality of a third State; second, a successor State cannot attribute its nationality to persons who would otherwise qualify to acquire its nationality but who have their habitual residence in a third State and also have the nationality of that State against their will. 33/ When referring to a "third" State, commentators had in fact in mind States other than either the predecessor State, or, as the case may be, another successor

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32/ Article 7 corresponds to article 4 proposed by the Special Rapporteur in his Third report, document A/CN.4/480, p. 49.

33/ For cases involving the attribution of nationality to persons residing outside the territory affected by the succession of States, see O'Connell (1956), op. cit., pp. 251-258.

State. The Commission, however, considered that there is no reason not to extend the application of article 7 also to persons concerned who have their habitual residence not in a "third State", but in another "State concerned". Finally, as explicitly stated in paragraph 1 and as implied in paragraph 2, article 7 covers both persons who have their habitual residence in the State of which they are nationals as well as persons who have their habitual residence in one State, while being nationals of yet another State.

(3) Accordingly, paragraph 1 lifts, under specific conditions, any obligation which a successor State may have to attribute its nationality to persons concerned, as a corollary of a right of a person concerned to a nationality under the terms of article 1 of the present draft articles. However, if a person referred to in paragraph 1 who has an appropriate connection with a successor State wishes to acquire the nationality of that State, e.g. by exercising an option to that effect, the obligation of the latter to attribute its nationality to that person is not lifted. This is indicated by the opening phrase, "subject to the provisions of article 10". Paragraph 1 of article 7 concerns the attribution of nationality by virtue of national legislation. It is, however, without prejudice to any obligation of a successor State vis-à-vis other States concerned under any relevant treaty.

(4) Paragraph 2 restricts the power of a successor State to extend its nationality to persons concerned not residing in its territory and having the nationality of another State. However, a successor State may attribute its nationality to such persons on a consensual basis. This raises the question as to how consent should be ascertained. Establishing a requirement of explicit consent would not be a practical solution, as it would put a heavy administrative burden on the successor State. The Commission considered it preferable to introduce a presumption of consent where persons concerned being offered an option to reject the nationality of the successor State remain silent. This is reflected in the expression "not ... against their will" used in paragraph 2.

(5) The restriction of the competence of the successor State under paragraph 2 does not apply when it would result in statelessness. In such case, that State has the right to attribute its nationality to a person referred to in paragraph 1, irrespective of that person's will.

Article 8 34/

Renunciation of the nationality of another State as a condition for attribution of nationality

When a person concerned who is qualified to acquire the nationality of a successor State has the nationality of another State concerned, the former State may make the attribution of its nationality dependent on the renunciation by such person of the nationality of the latter State. However, such requirement shall not be applied in a manner which would result in rendering the person concerned stateless, even if only temporarily.

Commentary

(1) It is generally accepted that, as a means of reducing or eliminating dual and multiple nationality, a State may require the renunciation of the nationality of another State as a condition for granting its nationality. This requirement is also found in some legislations of successor States, namely in relation to the voluntary acquisition of their nationality upon the succession.

(2) It is not for the Commission to suggest which policy States should pursue on the matter of dual/multiple nationality. Accordingly, the draft articles are neutral in this respect. The Commission is nevertheless concerned with the risk of statelessness related to the above requirement of prior renunciation of another nationality. Similar concerns have been voiced in other forums. 35/

(3) The practice of States indicates that, in relation to a succession of States, the requirement of renunciation applied only with respect to the

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34/ Article 8 corresponds to article 5 proposed by the Special Rapporteur in his Third report, document A/CN.4/480, p. 52.

35/ Accordingly, experts of the Council of Europe concluded that "a State which gives an unconditional promise to grant its nationality is responsible at an international level for the *de jure* statelessness which arises from the release of a person from his or her previous nationality, on the basis of this promise". Report of the Experts of the Council of Europe on the Citizenship Laws, op. cit., para. 56.

nationality of another State concerned, but not the nationality of a "third State". 36/ In any event, only the former aspect falls within the scope of the present topic. Article 8 is drafted accordingly.

(4) The first sentence underscores the freedom of each successor State in deciding whether to make the acquisition of its nationality dependent on the renunciation by a person concerned of the nationality of another State concerned. Such is the function of the word "may". The second sentence addresses the problem of statelessness. It does not prescribe a particular legislative technique. It just sets out a general requirement that the condition in question should not be applied in such a way as to render the person concerned stateless, even if only temporarily.

(5) The expression "another State concerned" may refer to the predecessor State, or, as the case may be, to another successor State, as the rule in article 8 applies in all situations of succession of States, except, of course, unification, where the successor State remains as the only "State concerned".

Article 9 37/

Loss of nationality upon the voluntary acquisition of the nationality of another State

1. A predecessor State may provide that persons who, in relation to the succession of States, voluntarily acquire the nationality of a successor State shall lose its nationality.

2. A successor State may provide that persons who, in relation to the succession of States, voluntarily acquire the nationality of another successor State or, as the case may be, retain the nationality of the predecessor State shall lose its nationality acquired in relation to such succession.

Commentary

(1) As in the case of the preceding article, article 9 contains a provision that derives from a rule of a more general application, which has been adapted to the case of a succession of States. The loss of a State's

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36/ See the Third report on nationality in relation to the succession of States, document A/CN.4/480, para. (31) of the commentary to draft articles 7 and 8 proposed by the Special Rapporteur.

37/ Article 9 corresponds to article 6 proposed by the Special Rapporteur in his Third report, document A/CN.4/480, p. 53.

nationality upon the voluntary acquisition of the nationality of another State is a routine provision in the legislation of States pursuing a policy aimed at avoiding dual or multiple nationality. In the same vein, the Montevideo Convention on Nationality of 26 December 1936 stipulates that any naturalization (presumably voluntary) of an individual in a signatory State carries with it the loss of the nationality of origin. 38/ Likewise, according to the 1963 Convention on Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality, concluded within the framework of the Council of Europe, persons who of their own free will acquire another nationality, by means of naturalization, option or recovery, lose their former nationality. 39/

(2) Provisions of this kind are also to be found in legislations adopted in relation to a succession of States. Thus, Article 20 of the Law on Citizenship of the Republic of Belarus of 18 October 1991 provides that "[t]he citizenship of the Republic of Belarus will be lost ... upon acquisition, by the person concerned, of the citizenship of another State, unless otherwise provided by a treaty binding upon the Republic of Belarus ... The loss of citizenship becomes effective at the moment of the registration of the relevant fact by the competent authorities ...". 40/

(3) Article 9 applies in all types of succession of States, except unification, where the successor State remains as the only "State concerned". It recognizes that any successor or predecessor State, as the case may be, is entitled to withdraw its nationality from persons concerned who, in relation to the succession of States, voluntarily acquired the nationality of another State concerned. It leaves aside the question of the voluntary acquisition of the nationality of a third State, as it is beyond the scope of the present topic.

38/ Article 1. Laws concerning nationality, op. cit., p. 585.

39/ Article 1. United Nations Treaty Series, vol. 634, p. 224. The possibility for a State to withdraw its nationality as a consequence of the voluntary acquisition of another nationality is also recognized under Article 7, paragraph 1 a, of the 1997 European Convention on Nationality. Council of Europe document DIR/JUR (97) 6.

40/ See the materials submitted by Belarus.

(4) The rights of the predecessor State (paragraph 1) and that of the successor State (paragraph 2) are spelled out separately for reasons of clarity. As regards paragraph 2, depending on the type of succession of States, the assumption is the voluntary acquisition of the nationality of another successor State (in the case of dissolution) or the voluntary retention of the nationality of the predecessor State (in the case of separation or transfer of part of the territory) or even both (in the event of the creation of several successor States by separation of parts of territory from a predecessor State which continues to exist).

(5) Article 9 does not address the question as to when the loss of nationality should become effective. Since it is for the State concerned itself to decide on the main question, i.e., whether to withdraw its nationality from a person upon the voluntary acquisition of the nationality of another State, it is also for that State to determine when such withdrawal becomes effective. This may occur upon the acquisition of the nationality of another State or later, e.g., after a person concerned has effectively transferred his or her habitual residence outside the territory of the State whose nationality he or she is to lose. 41/ In any event, the State concerned shall not withdraw its nationality from persons concerned who have initiated a procedure aimed at acquiring the nationality of another State concerned before such persons effectively acquire the nationality of the latter State.

Article 10 42/

Respect for the will of persons concerned

1. States concerned shall give consideration to the will of persons concerned whenever those persons are qualified to acquire the nationality of two or more States concerned.

2. Each State concerned shall grant a right to opt for its nationality to persons concerned who have an appropriate connection with that State if those persons would otherwise become stateless as a result of the succession of States.

41/ This was for instance the case as regards the cession by Finland of a part of its territory to the Soviet Union in 1947. See Second report on State succession and its impact on the nationality of natural and legal persons, document A/CN.4/474, para. 89.

42/ Article 10 corresponds to articles 7 and 8 proposed by the Special Rapporteur in his Third report, document A/CN.4/480, pp. 55-56.

3. When persons entitled to the right of option have exercised such right, the State whose nationality they have opted for shall attribute its nationality to such persons.

4. When persons entitled to the right of option have exercised such right, the State whose nationality they have renounced shall withdraw its nationality from such persons, unless they would thereby become stateless.

5. States concerned should provide a reasonable time limit for the exercise of the rights set forth in paragraphs 1 and 2.

Commentary

(1) Numerous treaties regulating questions of nationality in connection with the succession of States as well as relevant national laws have provided for the right of option or for a similar procedure enabling individuals concerned to establish their nationality by choosing either between the nationality of the predecessor and that of the successor States or between the nationalities of two or more successor States.

(2) This was, for example, the case of the Treaty of Peace, Friendship, Limits and Settlement between Mexico and the United States of America of 2 February 1848, or the Treaty on the Delimitation of the Frontier between Mexico and Guatemala, of 27 September 1882. 43/ The Peace Treaties adopted after the end of the First World War provided for a right of option mainly as a means to correct the effects of their other provisions on the automatic acquisition of the nationality of the successor State and loss of the nationality of the predecessor State by persons habitually resident in the territories involved in the succession of States. 44/ A right of option was

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43/ See Third report on nationality in relation to the succession of States, document A/CN.4/480/Add.1, paras. (5) and (8) of tne commentary to draft article 17 proposed by the Special Rapporteur.

44/ See articles 37, 85, 91, 106 and 113 of the Treaty of Peace between the Allied and Associated Powers and Germany signed at Versailles on 28 June 1919 (Materials on succession of States, op. cit., pp. 20, 28-32, and 489), articles 78-82 of the Treaty of Peace between the Allied and Associated Powers and Austria signed at Saint-Germain-en-Laye on 10 September 1919 (G.F. de Martens, Nouveau recueil général de traités , third series, vol. XI, pp. 712-713), respective articles 3 and 4 of the Treaty between the Allied and Associated Powers and Poland signed at Versailles on 28 June 1919, the Treaty between the Allied and Associated Powers and Czechoslovakia and the Treaty between the Allied and Associated Powers and the Serb-Croat-Slovene State, both signed at Saint-Germain-en-Laye on 10 September 1919, as well as the Treaty of Paris between the Allied and Associated Powers and Romania of

also granted in article 19 of the Treaty of Peace between the Allied and Associated Powers and Italy of 10 February 1947. 45/

(3) Among the documents concerning nationality issues in relation to decolonization, while some contained provisions on the right of option, several did not. Thus, the Burma Independence Act, after stipulating that the categories of persons specified in the First Schedule to that Act automatically lost British nationality, also provided, in section 2, subsection (2), that any such person who was immediately before independence domiciled or ordinarily resident in any place outside Burma in which the British Monarch had jurisdiction over British subjects could, by a declaration made before the expiration of two years after independence, elect to remain a British subject. 46/ The free choice of nationality was also envisaged under article 4 of the Agreement between India and France for the Settlement of the Question of the Future of the French Establishments in India, signed at New Delhi on 21 October 1954. 47/ The Treaty of Cession of the French Establishments of Pondicherry, Karikal, Mahe and Yanam, between India and France, signed at New Delhi on 28 May 1956, as well contained provisions on the right of option. 48/

(4) In recent cases of succession of States in Eastern and Central Europe, where questions of nationality were not resolved by treaty but

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9 December 1919, (ibid., vol. XIII, p. 505, pp. 514-515, p. 524 and p. 531 respectively), articles 40 and 45 of the Treaty of Peace between the Allied and Associated Powers and Bulgaria signed at Neuilly-sur-Seine on 27 November 1919 (Materials on succession of States, op. cit., pp. 38-39), article 64 of the Treaty of Peace between the Allied and Associated Powers and Hungary, signed at Trianon on 4 June 1920 (Martens, op. cit., vol. XII, pp. 440-441), article 9 of the Peace Treaty of Tartu of 11 December 1920 concerning the cession by Russia to Finland of the area of Petsamo (see Third report on nationality in relation to the succession of States, document A/CN.4/480, para. (20) of the commentary to draft articles 7 and 8 proposed by the Special Rapporteur), and articles 21 and 31-36 of the Treaty of Lausanne of 1923 (Materials on succession of States, op. cit., pp. 46-47).

45/ Materials on succession of States, op. cit., p. 59.

46/ Section 2, subsection (3). For the remaining provisions of section 2 on the right of option and its consequences, see also subsections (4) and (6); ibid., p. 146.

47/ Ibid., p. 80.

48/ Ibid., p. 87.

solely through the national legislation of the States concerned, the possibility of choice, to the extent permitted by internal law, was in fact established simultaneously in the legal orders of at least two States. Thus, the Law on the Citizenship of the Slovak Republic contained liberal provisions on the optional acquisition of nationality. According to article 3, paragraph 1, every individual who was on 31 December 1992 a citizen of the Czech and Slovak Federal Republic and did not acquire the citizenship of Slovakia ipso facto, had the right to opt for the citizenship of Slovakia. 49/ No other requirement, such as permanent residence in the territory of Slovakia, was imposed for the optional acquisition of the citizenship of Slovakia by former Czechoslovak citizens.

(5) The function which international law attributes to the will of individuals in matters of acquisition and loss of nationality in cases of succession of States is, however, among the issues on which doctrinal views considerably diverge. 50/ Several commentators have stressed the importance of the right of option in this respect. 51/ While most of them consider that the legal basis of such right can be deduced only from a treaty, others, however, have asserted the existence of an independent right of option as an attribute of the principle of self-determination. 52/

(6) In the view of the Commission, the respect for the will of the individual is a consideration which, with the development of human rights law, has become paramount. However, this does not mean that every acquisition of nationality upon a succession of States must have a consensual basis.

49/ See Third report on nationality in relation to the succession of States, document A/CN.4/480, para. (30) of the commentary to draft articles 7 and 8 proposed by the Special Rapporteur.

50/ There is a substantial body of doctrinal opinion according to which the successor State is entitled to extend its nationality to those individuals susceptible of acquiring such nationality by virtue of the change of sovereignty, irrespective of the wishes of those individuals. O'Connell (1956), op. cit., p. 250.

51/ See, e.g., Charles Rousseau, Droit international public, tenth edition, Paris, Dalloz, 1984, p. 169 et seq.

52/ See Joseph L. Kunz, "L'option de nationalité", Recueil des cours ... 1930-I, vol. 31, pp. 109-172; "Nationality and Option Clauses in the Italian Peace Treaty of 1947", American Journal of International Law, vol. 41 (1947), pp. 622-631.

Accordingly, the Commission considered that a right of option has a role to play in resolving problems of attribution of nationality to persons concerned falling within a "grey area" of competing jurisdictions of States concerned.

(7) The term "option" used in the present draft articles does not only mean a choice between nationalities, but is used in a broader sense, covering also the procedures of "opting in", i.e., the voluntary acquisition of nationality by declaration, and "opting out", i.e., the renunciation of a nationality acquired ex lege. Such right of option may be provided under national legislation even without agreement between States concerned.

(8) Paragraph 1 of article 10 sets out the requirement of respect for the will of the person concerned where such person is qualified to acquire the nationality of two or several States concerned. The expression "shall give consideration" implies that there is no strict obligation to grant a right of option to this category of persons concerned. Paragraph 1 does also not prejudice the policy of single or dual nationality which each State concerned may pursue.

(9) Paragraph 2 highlights the function of the right of option as one of the techniques aimed at eliminating the risk of statelessness in situations of succession of States. Such approach was adopted, e.g., in the Burma Independence Act 53/ or in article 6 of the Czech Law on Acquisition and Loss of Citizenship. 54/ The Commission chose to describe the link which must exist between the persons concerned and a particular State concerned by means of the expression "appropriate connection", which should be interpreted in a broader sense than the notion of "genuine link". The reason for this terminological choice is the paramount importance attached by the Commission to the prevention of statelessness, which, in this particular case, supersedes the strict requirement of an effective nationality.

(10) Some members, however, considered that, in the absence of objective criteria for determining the existence of an "appropriate connection", paragraph 2 introduced an undesirable element of subjectivity. They therefore believed that there was no justification for departing from the well-established notion of "genuine link". Others considered that what

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53/ See para. (4) of the present commentary.

54/ See Third report on nationality in relation to the succession of States, document A/CN.4/480, footnote 161.

constitutes an "appropriate connection" in a particular case is spelled out in detail in Part II and that the use of the concept of "genuine link" in a context other than diplomatic protection raised difficulties. Still other members believed that an alternative to either expression should be found.

(11) The Commission decided to couch paragraph 2 in terms of an obligation, in order to ensure consistency with the obligation to prevent statelessness under article 3.

(12) Paragraphs 3 and 4 spell out the consequences of the exercise of the right of option by a person concerned as regards the obligations of the States concerned mentioned therein. The obligations of various States involved in a particular succession may operate jointly, when the right of option is based on a treaty between them, but also separately, when the right of option (in the form of both opting-in or opting-out) is granted solely by the legislation of these States. Thus, acquisition upon option of the nationality of one State concerned does not inevitably imply the obligation of the other State concerned to withdraw its nationality. Such obligation exists only if provided in a treaty between the States concerned or if the person opting for the nationality of one State concerned also renounces the nationality of the other in accordance with the provisions of the latter's legislation.

(13) Paragraph 5 stipulates the general requirement of a reasonable time limit for the exercise of the right of option, irrespective of whether it is provided in a treaty between States concerned or in the legislation of a State concerned. State practice shows that the length of the period during which persons concerned were granted the right of option varied considerably. For example, under the Treaty of Cession of the Territory of the Free Town of Chandernagore between India and France, of 2 February 1951 the right of option was provided for a period of six months, 55/ while the Treaty between Spain and Morocco of 4 January 1969 regarding Spain's retrocession to Morocco of the Territory of Ifni established a three months period. 56/ In some cases, the

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55/ Ibid., pp. 77-78.

56/ See Third report on nationality in relation to the succession of States, document A/CN.4/480, para. (28) of the commentary to draft articles 7 and 8 proposed by the Special Rapporteur.

right of option was granted for a considerable period of time. 57/ What constitutes a "reasonable" time limit may depend upon the circumstances of the succession of States, but also on the categories to which persons concerned entitled to the right of option belong. In the view of the Commission, a "reasonable time limit" is a time limit necessary to ensure an effective exercise of the right of option.

Article 11 58/

Unity of a family

Where the acquisition or loss of nationality in relation to the succession of States would impair the unity of a family, States concerned shall take all appropriate measures to allow that family to remain together or to be reunited.

Commentary

(1) There are a number of examples from State practice of provisions addressing the problem of the common destiny of families upon a succession of States. The general policy in the treaties concluded after the First World War was to ensure that the members of a family acquired the same nationality as the head of the family, whether the latter had acquired it automatically or upon option. 59/ Article 19 of the Treaty of Peace between the Allied and Associated Powers and Italy of 10 February 1947, on the contrary, did not envisage the simultaneous acquisition by a wife of her husband's nationality following his exercise of an option. Minor children, however, automatically acquired the nationality for which the head of the family had opted. 60/

(2) The principle of family unity was also highlighted, albeit in a broader context, in the comment to article 19 of the 1929 Harvard Draft Convention on Nationality, where it was stated that "[i]t is desirable in some

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57/ See the Evian Declaration (Algeria-France) of 19 March 1962, United Nations, Treaty Series, vol. 507, pp. 35 and 37.

58/ Article 11 corresponds to article 9 proposed by the Special Rapporteur in his Third report, document A/CN.4/480, p. 72.

59/ See the provisions cited in footnote [44] above.

60/ Materials on succession of States, op. cit., p. 59.

measure that members of a family should have the same nationality, and the principle of family unity is regarded in many countries as a sufficient basis for the application of this simple solution". 61/

(3) The approach usually followed during the process of decolonization was to enable a wife to acquire the nationality of her husband upon application, as evidenced by relevant legal instruments of Barbados, Burma, Botswana, Guyana, Jamaica, Malawi, Mauritius, Sierra Leone and Trinidad and Tobago 62/, or by various treaty provisions, such as annex D to the Treaty concerning the Establishment of the Republic of Cyprus of 16 August 1960 63/ and article 6 of the Treaty of Cession of the French Establishments of Pondicherry, Karikal, Mahe and Yanam, between India and France, signed at New Delhi on 28 May 1956. 64/

(4) A concern for the preservation of the unity of the family is also apparent in some national legislations of successor States that emerged from the recent dissolutions in Eastern and Central Europe. 65/

(5) The Commission concluded that, while it is highly desirable to enable members of a family to acquire the same nationality upon a succession of States, it is not necessary to formulate a strict rule to this end, as long as the acquisition of different nationalities by the members of a family did

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61/ Comments to the 1929 Harvard Draft Convention on Nationality, American Journal of International Law , vol. 23 (Special Suppl.) (1929), p. 69. The main deficiency of provisions envisaging the simultaneous change of nationality of all the members of a family following the change of the nationality of the head of the family was the fact that they were placing the woman in a position of subordination. In an attempt to overcome this problem, article 4 of the resolution adopted by the Institute of International Law on 29 September 1896 stipulated that, "[u]nless the contrary has been expressly reserved at the time of naturalization, the change of nationality of the father of a family carries with it that of his wife, if not separated from her, and of his minor children, saving the right of the wife to recover her former nationality by a simple declaration, and saving also the right of option of the children for their former nationality, either in the year following their majority, or beginning with their emancipation, with the consent of their legal assistant." Cited in ibid., p. 75.

62/ Ibid., p. 124, pp. 137-139, pp. 145-146, pp. 203-204, p. 246, pp. 307-308, p. 353, pp. 389-390, and p. 429 respectively.

63/ Ibid., pp. 173-177.

64/ Ibid., p. 87.

65/ For relevant examples, see Third report on nationality in relation to the succession of States, document A/CN.4/480, paras. 20) and (21) of the commentary to draft article 9 proposed by the Special Rapporteur.

not prevent them from remaining together or being reunited. Accordingly, the obligation set out in article 11 is of a general nature. For example, whenever a family faces difficulties in living together as a unit as a result of provisions of nationality laws relating to a succession of States, States concerned are under an obligation to eliminate such legislative obstacles. The expression "appropriate measures", however, is intended to exclude unreasonable demands of persons concerned in this respect.

(6) Some members of the Commission were of the view that article 11 goes beyond the scope of the present topic. Others, however, believed that it is closely connected to nationality issues in relation to the succession of States, as the problem of family unity may arise in such context on a large scale.

(7) Doubts were expressed by some members regarding the applicability of the principle embodied in article 11 due to the different interpretations of the concept of "family" in various regions of the world. Others were of the view that a succession of States usually involves States from the same region sharing the same or a similar interpretation of this concept, so that the said problem did not arise.

Article 12 66/

Child born after the succession of States

A child of a person concerned, born after the date of the succession of States, who has not acquired any nationality, has the right to the nationality of the State concerned on whose territory that child was born.

Commentary

(1) Article 12 deals with the problem of children born to persons concerned after the date of the succession of States. It follows from its title that the present topic is limited to questions of nationality solely in relation to the occurrence of a succession of States. Questions of nationality related to situations which occurred prior or after the date of the succession are therefore excluded from the scope of the present draft

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66/ Article 12 corresponds to article 1, paragraph 1, proposed by the Special Rapporteur in his Third report, document A/CN.4/480, p. 35.

articles. However, the Commission recognized the need for an exception from the rigid definition _ratione temporis_ of the present draft articles and for addressing also the problem of children born after the succession of States from parents whose nationality following the succession has not been determined. Given the fact that, in a considerable number of legal orders, the nationality of children depends to a large extent on that of their parents, the uncertainty about the parents' nationality may have a direct impact on the nationality of a child. The latter is generally determined after the final resolution of the problem of the parents' nationality, but, in exceptional situations, can remain undetermined if, for example, a parent dies in the meantime. That is why the Commission considered that a specific provision concerning the nationality of newborn children was useful.

(2) The inclusion of article 12 is justified in the light of the importance that several instruments attach to the rights of children, including their right to acquire a nationality. Thus, principle 3 of the Declaration of the Rights of the Child provides that "[t]he child shall be entitled from his birth to a name and a nationality". Article 24, paragraph 3, of the International Covenant on Civil and Political Rights guarantees every child the right to acquire a nationality. Article 7, paragraph 1, of the Convention on the Rights of the Child provides that "[t]he child shall be registered immediately after birth and shall have [...] the right to acquire a nationality". 67/ From the joint reading of this provision and article 2, paragraph 1, of the Convention, according to which "States Parties shall respect and ensure the rights set forth in the present Convention to each child _within their jurisdiction_ without discrimination of any kind" (emphasis added), it follows that, unless the child acquires the nationality of another State, he or she has, in the last instance, the right to the nationality of the State on the territory of which he or she was born.

(3) It is also useful to recall that, according to article 9 of the 1929 Harvard Draft Convention on Nationality, "[a] State shall confer its nationality at birth upon a person born within its territory if such person

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67/ Paragraph 2 of the same article provides, moreover, that "States Parties shall ensure the implementation of these rights [...] in particular where the child would otherwise be stateless".

does not acquire another nationality at birth". 68/ Likewise, article 20 of the American Convention on Human Rights (the "Pact of San José, Costa Rica") of 22 November 1969 stipulates that "[e]very person has the right to the nationality of the State in whose territory he was born if he does not have the right to any other nationality".

(4) There is a strong argument in favour of an approach consistent with the above instruments, namely that, where the predecessor State was a party to any such instruments, their provisions could be applicable, by virtue of the rules of succession in respect of treaties, to the successor State, including as regards the situation envisaged in article 12.

(5) Article 12 is limited to the solution of the problem of the nationality of children born within the territory of States concerned. It does not envisage the situation where a child of a person referred to in article 12 is born in a third State. Extending the scope of application of the rule set out in article 12 to situations where the child was born in a third State would mean to impose a duty on States other than those involved in the succession. While it is true that those third States that are parties to the Convention on the Rights of the Child may already have such obligation in any event, it is also true that this problem exceeds the scope of the present draft articles which should remain limited to problems where a "person concerned" is on one side of the legal bond and a "State concerned" on the other.

68/ American Journal of International Law, vol. 23 (Special Suppl.) (1929), p. 14.

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